

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 SERGIO MOMOX-CASELIS, individually
4 and as Guardian Ad Litem for Maria Momox-
5 Caselis, and SERGIO MOMOX-CASELIS
6 and KRISTIN WOODS, as Co-Special
7 Administrators of the estate of M.M.,

8 Plaintiffs

9 v.

10 MAIRA JUAREZ-PAEZ, et al.,

11 Defendants

Case No.: 2:16-cv-00054-APG-GWF

**Order (1) Denying Motion to Amend,
(2) Denying the Plaintiffs' Motion for
Summary Judgment, (3) Denying as Moot
the Motion to Strike, and (4) Granting the
Defendants' Motion for Summary
Judgment**

[ECF Nos. 113, 125, 126, 131]

12 Plaintiffs Sergio Momox-Caselis and Maria Momox-Caselis are the natural parents of
13 deceased child M.M. The plaintiffs allege M.M. was wrongfully removed from their home,
14 wrongfully removed from her initial foster mother's home, and placed in a neglectful foster
15 home. M.M. died when her foster parent, Joaquin Juarez-Paez, either deliberately or accidentally
16 gave her an overdose of medication and possibly suffocated her. The day M.M. died, Joaquin
17 was also found dead of an overdose. His suicide note apologized for killing M.M. but asserted
18 the child's death was not intentional.

19 The plaintiffs sued Joaquin and Maira Juarez-Paez, as well as various county officials
20 involved in the foster care system. Joaquin's estate, Maira, and defendant Irene Koziki have
21 been dismissed from the action. ECF Nos. 100, 112.

22 The remaining defendants (Clark County and its employees) move for summary
23 judgment. The plaintiffs oppose, move to amend their first claim, and move for partial summary
judgment on the issue of duty related to their state law claims. The defendants oppose
amendment, contending it is untimely and futile. They also argue the motion for partial

1 summary judgment is untimely. The defendants move to strike the plaintiffs' summary judgment
2 brief and separate statement of facts as exceeding the page limit. Finally, the defendants move to
3 strike the plaintiffs' expert reports because they are unauthenticated hearsay, they are based on
4 case law that has been overruled, and the rebuttal expert's report was untimely.

5 The parties are familiar with the facts, so I will not repeat them here except where
6 necessary. I deny the plaintiffs' motion to amend to assert their first claim under the Fourth
7 Amendment because it would be futile. I deny the plaintiffs' motion for partial summary
8 judgment because it is untimely. I grant the defendants' motion for summary judgment. I deny
9 the defendants' motion to strike because even considering the excess pages and exhibits, no
10 genuine dispute remains and the defendants are entitled to judgment as a matter of law on all
11 claims. Although I deny the motion to strike, I caution the plaintiffs' counsel that use of a
12 separate statement of facts to evade the page limit is inappropriate.

13 I. ANALYSIS

14 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to
15 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
16 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence
18 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

19 The party seeking summary judgment bears the initial burden of informing the court of
20 the basis for its motion and identifying those portions of the record that demonstrate the absence
21 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
22 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
23 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531

1 (9th Cir. 2000). I view the evidence and reasonable inferences in the light most favorable to the
2 non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir.
3 2008).

4 **A. Count One**

5 In count one of the second amended complaint, the plaintiffs assert a claim under 42
6 U.S.C. § 1983 against Clark County. They allege the Clark County Department of Family
7 Services (DFS) removed M.M. from her natural parents' care without warning and without an
8 immediate threat to her safety, in violation of their Fifth and Fourteenth Amendment rights. The
9 defendants argue this claim is not properly based on the Fifth Amendment because M.M.'s
10 removal from the home was a Fourth Amendment seizure. They also argue the removal of M.M.
11 from the home was appropriate because Maria Momox-Caselis left the children at home
12 unsupervised.

13 The plaintiffs respond by requesting leave to amend to assert this claim under the Fourth
14 Amendment instead of the Fifth Amendment. On the merits, the plaintiffs argue the defendants
15 did not appropriately remove the children from their natural parents' home and made no
16 reunification efforts between M.M.'s parents and their other children until after M.M. died. The
17 plaintiffs contend the removal from the natural parents' home was unnecessary because the
18 problems derived from economic issues and could have been remedied through education and
19 support of the parents.

20 To state a § 1983 claim, a plaintiff must allege that "(1) the conduct complained of was
21 committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff
22 of a federal constitutional or statutory right." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir.
23

1 2011). The defendants do not dispute they acted under color of state law. The question is
2 whether the defendants deprived the plaintiffs of a constitutional right.

3 The defendants have satisfied their initial burden at summary judgment by pointing out
4 an absence of evidence supporting the plaintiffs' first claim. *Devereaux v. Abbey*, 263 F.3d 1070,
5 1076 (9th Cir. 2001). The defendants also have presented evidence that the children were
6 appropriately removed from the home because Maria left the children (who ranged from 2 to 12
7 years old) unsupervised on multiple occasions. *See* ECF Nos. 113-2; 113-41; 113-42.

8 The burden thus shifted to the plaintiffs to point to evidence that would raise a genuine
9 dispute for trial. *Devereaux*, 263 F.3d at 1076. The plaintiffs have not done so. They state in
10 their response brief that the propriety of M.M.'s removal from the home is "hotly disputed." ECF
11 No. 124 at 5. But they do not identify the applicable law, explain how the defendants violated
12 either the parents' Fourteenth Amendment rights or M.M.'s Fourth Amendment rights, or cite to
13 any evidence that would raise a genuine dispute about the propriety of Clark County's actions.¹ I
14 therefore grant the defendants' summary judgment motion as to this claim. I also deny the
15 plaintiffs' motion to amend to alter the legal basis for their claim because amendment would be
16 futile. *Ahlmeier v. Nevada Sys. of Higher Educ.*, 555 F.3d 1051, 1055 (9th Cir. 2009) (stating
17 that "futility of amendment alone can justify the denial of a motion" to amend).

18 **B. Count Two**

19 In count two, the plaintiffs assert M.M. had a due process right to basic human needs
20 while in state custody, which the defendants violated by improperly licensing the Juarez-Paezes
21

22 ¹ The plaintiffs also do not refute the evidence that M.M. was properly removed from the
23 initial foster mother's home. ECF Nos. 113-5; 113-6. Nor do they identify applicable law related
to Clark County's actions in removing M.M. from the initial foster mother's home, explain how
Clark County violated M.M.'s rights under that law, or point to evidence in support.

1 as foster parents, allowing the Juarez-Paez home to host multiple young foster children who were
2 not siblings, and by not adequately supervising the placement to ensure the home was a safe
3 place. Count two also asserts these acts were done pursuant to official policy or longstanding
4 practice.

5 The defendants argue for summary judgment on this claim because they properly
6 followed Nevada Administrative Code section 424.160(4), which allows two children under the
7 age of 18 months to be placed in the same foster home. They contend they made monthly visits
8 as required, no safety concerns were noted, and there is no evidence they knew or should have
9 known that M.M. was in danger in the Juarez-Paez home. They also contend the Juarez-Paezes
10 were properly licensed and trained. Finally, the defendants argue there is no policy, custom, or
11 practice that caused M.M.'s death. Alternatively, the defendants assert they are entitled to
12 qualified immunity.

13 The plaintiffs respond that the defendants either had a special relationship with M.M. as a
14 foster child or created the danger to which M.M. was exposed by placing her in the Juarez-Paez
15 home. The plaintiffs contend the defendants failed to ensure M.M.'s safety because they
16 (1) improperly investigated and licensed the Juarez-Paezes, (2) placed her in the Juarez-Paez
17 foster home knowing it was a dangerous situation, (3) failed to supervise and protect her,
18 (4) failed to attempt reunification with her natural parents or her prior foster mother, and
19 (5) failed to properly train foster care social workers and supervisors.

20 Government officials performing discretionary functions may be entitled to qualified
21 immunity for claims made under § 1983. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).
22 Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the
23 law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

1 In ruling on a qualified immunity defense, I consider whether the evidence viewed in the
2 light most favorable to the plaintiffs shows the defendants' conduct violated a constitutional
3 right. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). If so, I then determine whether the
4 defendants' conduct violated clearly established law. *Id.* I may perform this two-step inquiry in
5 any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

6 "A Government official's conduct violates clearly established law when, at the time of
7 the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable
8 official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563
9 U.S. 731, 741 (2011) (quotation omitted). The plaintiff need not identify a case "directly on
10 point, but existing precedent must have placed the statutory or constitutional question beyond
11 debate." *Id.* I make this second inquiry "in light of the specific context of the case, not as a
12 broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A defendant will be
13 entitled to qualified immunity even if he was mistaken in his belief that his conduct was lawful,
14 so long as that belief was reasonable. *Wilkins*, 350 F.3d at 955. The plaintiffs bear the burden of
15 showing the rights at issue were clearly established at the time of the defendants' actions.
16 *Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009).

17 Count two alleges a due process violation. The due process clause "generally does not
18 confer any affirmative right to governmental aid, even where such aid may be necessary to
19 secure life, liberty, or property interests," nor does it "impose a duty on [the state] to protect
20 individuals from third parties." *Pate*, 648 F.3d at 971; *see also DeShaney v. Winnebago Cnty.*
21 *Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating the due process clause's "purpose was to
22 protect the people from the State, not to ensure that the State protected them from each other").
23

1 Thus, generally, “a State’s failure to protect an individual against private violence simply does
2 not constitute a violation of the Due Process Clause.” *DeShaney*, 489 U.S. at 197.

3 This general rule is subject to two exceptions. A state’s “omission or failure to act may
4 give rise to a § 1983 claim” when either (1) “a special relationship exists between the plaintiff
5 and the state (the special-relationship exception)” or (2) “the state affirmatively places the
6 plaintiff in danger by acting with deliberate indifference to a known or obvious danger (the state-
7 created danger exception).” *Patel*, 648 F.3d at 971-72 (quotation omitted).

8 “Once the state assumes wardship of a child, the state owes the child, as part of that
9 person’s protected liberty interest, reasonable safety and minimally adequate care” *Tamas v.*
10 *Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 842 (9th Cir. 2010) (quotation omitted). Thus, a
11 foster child has a Fourteenth Amendment substantive due process liberty interest “in social
12 worker supervision and protection from harm inflicted by a foster parent.” *Id.* To violate this due
13 process right, state officials must act with deliberate indifference to a danger that is known or “so
14 obvious as to imply knowledge.” *Id.* at 844 (quotation omitted). The “deliberate indifference
15 standard, as applied to foster children, requires . . . showing [(1)] an objectively substantial risk
16 of harm,” (2) the defendants “were subjectively aware of facts from which an inference could be
17 drawn that a substantial risk of serious harm existed,” and (3) the defendants either “actually
18 drew that inference or . . . a reasonable official would have been compelled to draw that
19 inference.” *Id.* at 845. “[T]he subjective component may be inferred from the fact that the risk of
20 harm is obvious.” *Henry A. v. Willden*, 678 F.3d 991, 1001 (9th Cir. 2012) (quotation omitted).

21 “The state-created danger exception creates the potential for § 1983 liability where a state
22 actor ‘creates or exposes an individual to a danger which he or she would not have otherwise
23 faced.’” *Campbell v. State of Wash. Dep’t of Soc. & Health Servs.*, 671 F.3d 837, 845 (9th Cir.

1 2011) (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006)). To fall
2 within this exception, there must be “affirmative conduct on the part of the state in placing the
3 plaintiff in danger” and the state must act “with deliberate indifference to a known or obvious
4 danger.” *Patel*, 648 F.3d at 974 (quotation omitted). To determine whether the state-created
5 danger exception applies, I consider: “(1) whether any affirmative actions of the official placed
6 the individual in danger he otherwise would not have faced; (2) whether the danger was known
7 or obvious; and (3) whether the officer acted with deliberate indifference to that danger.” *Henry*
8 *A.*, 678 F.3d at 1002.

9 The special relationship and state created danger exceptions potentially could apply in
10 this case. The defendants had a special relationship with M.M. because she was a ward of the
11 state as a foster child. As to state created danger, the defendants engaged in affirmative actions
12 by placing M.M. in the Juarez-Paez home. Thus, the questions are (1) whether a reasonable jury
13 could find the defendants acted with deliberate indifference to a known or obvious substantial
14 risk of harm and (2) whether the defendants are entitled to qualified immunity.

15 1. Licensing of the Juarez-Paez Home

16 The plaintiffs contend the defendants were deliberately indifferent to a substantial risk of
17 harm because they missed several red flags during the investigation and licensing of the Juarez-
18 Paezes as foster parents. First, the plaintiffs note that Joaquin lied on his application when he
19 stated he had no criminal history. However, the evidence shows Joaquin admitted to a citation
20 and there is no evidence that he had a more significant criminal history. *See* ECF Nos. 113-11 at
21 5-7; 113-15; 132-1 at 15-16. There is no evidence that the citation had anything to do with
22 violence or would have suggested M.M. would be in danger from Joaquin. Rather, it had to do
23 with Joaquin not having a work card and possessing false identification, meaning he was

1 working under a false social security number. *See* ECF No. 113-15. This does not raise a
2 genuine dispute whether M.M. faced an objectively substantial risk of harm or that the
3 defendants acted with deliberate indifference to such a risk.

4 Next, the plaintiffs contend Joaquin and Maira denied in their application that they had
5 physical problems but they both took many medications (including narcotic pain medication);
6 Joaquin was improperly using Maira's pain medication; and Joaquin's injuries sometimes left
7 him unable to walk, carry groceries, or pick up children. However, both Joaquin and Maira were
8 examined by a physician who determined they were physically and emotionally fit to foster a
9 child. ECF Nos. 113-12; 113-16. There is no evidence that Joaquin was using Maira's pain
10 medication or that anyone told the defendants that he was. *See* ECF No. 113-19 at 6-7. Rather,
11 the evidence shows Joaquin's condition worsened in the last few weeks before M.M.'s death.
12 ECF Nos. 113-22 at 8-9; 128 at 28-30. There is no evidence Maira or Joaquin told the
13 defendants about Joaquin's deteriorating physical condition and Maira did not remember doing
14 so. ECF No. 132-5 at 14-15. Defendant Shuandy Alvarez observed Joaquin on home visits and
15 did not notice any physical or mental warning signs. ECF No. 132-6 at 9-10 (testifying that she
16 saw Joaquin walk around, help with the children, hold M.M., and that he was attentive, talkative,
17 and calm). The defendants could not be deliberately indifferent to a risk they did not know, and
18 had no reason to know, existed. Indeed, even Maira, who lived in the home, was aware of
19 Joaquin's condition, and observed him interact with the children, characterized the incident as
20 unforeseeable even in hindsight. ECF No. 128 at 25 ("Q. In hindsight were there some warning
21 signs that something like this could happen? . . . THE WITNESS: No." (objection omitted)).

22 Next, the plaintiffs contend the defendants should have followed up on Maira's statement
23 during her pre-licensing physical that she was "probably okay" physically and mentally to care

1 for a foster child, and had they done so they would have learned Maira was inexperienced, so
2 they would not have placed two young children in her care. However, Maira did not express she
3 was “probably okay.” Rather, the examining doctor stated that Maira was “probably okay”
4 physically and mentally to be a foster parent. ECF No. 113-12 at 11. The plaintiffs have not
5 raised a genuine dispute whether M.M. was at a substantial risk of harm from Maira or that the
6 defendants were deliberately indifferent to such a risk. Maira is not the one who harmed M.M.

7 Next, the plaintiffs note that Joaquin did not provide a social security number on his
8 application to be a foster parent. They contend this should have raised concerns about the
9 stability of the placement because Joaquin previously had lost a job due to his status as an
10 undocumented immigrant and Maira could not qualify for subsidized day care because Joaquin
11 was working. The plaintiffs also point to the Foster Home Inspection Checklist, which shows
12 the Juarez-Paezes planned to use non-primary caregivers yet none of those caregivers had
13 completed the approval process. The plaintiffs argue that the file should have recorded that both
14 Maira and Joaquin were working full time, thus impacting child care arrangements.

15 Whether Joaquin had a social security number does not raise a genuine dispute that M.M.
16 would be at a substantial risk of harm in the household. Nor is there any evidence that his lack
17 of a social security number is a risk of harm so obvious any official would have understood the
18 placement was dangerous. The fact that Maira did not qualify for subsidized daycare does not
19 mean the Juarez-Paezes could not have paid for daycare, or used babysitters or respite care if
20 they needed it. ECF Nos. 113-10 at 12-13; 113-22 at 6-7; 113-37; 113-38; 132-1 at 16-17; 132-
21 10; 132-11. The Juarez-Paezes were provided with an application to obtain assistance from the
22 Urban League to pay for child care, but there is no evidence they sought that assistance. ECF
23 Nos. 113-38; 113-39; 132-1 at 17. The fact that the Juarez-Paezes chose not to take advantage of

1 alternative child care opportunities does not amount to deliberate indifference on the defendants'
2 part.

3 Finally, the plaintiffs note that the person completing the licensing forms was confusing
4 the Juarez-Paezes with another family. There is some documentation referring to the Juarez-
5 Paezes having two children when they had none. The plaintiffs do not explain how this has any
6 relation to M.M.'s death or why it would raise a genuine dispute about deliberate indifference in
7 licensing the Juarez-Paezes as foster parents.

8 In sum, the plaintiffs have not presented evidence raising a genuine dispute that the
9 defendants acted with deliberate indifference in licensing the Juarez-Paezes as foster parents.
10 Even if some combination of these factors could raise a genuine dispute, the plaintiffs have not
11 pointed to clearly established law that would have put the defendants on notice that their conduct
12 was unlawful. The defendants therefore are entitled to qualified immunity.

13 2. Placement of M.M. in the Juarez-Paez Home

14 The plaintiffs argue the defendants were deliberately indifferent to the danger M.M. faced
15 by being placed in the Juarez-Paez home. They first argue M.M should not have been placed in
16 the home because it already had a young foster child. This argument is based on a Clark County
17 Resolution in which the county "commits its good faith efforts toward achievement" of certain
18 goals. ECF No. 113-30. One of those goals was that "no more than one child under the age of 2
19 (except siblings) be placed in a foster home by March 31, 2008." *Id.* at 5. Nevada
20 Administrative Code section 424.160(4) provides that "[f]oster care must not be provided for
21 more than two children who are under the age of 18 months . . . , without the approval of the
22 licensing authority representative." The Clark County Resolution is an aspirational goal, while
23 the Nevada Administrative Code allows the placement of two young children in the same foster

1 home and would allow more with approval of the licensing authority representative. The
2 plaintiffs have not presented evidence raising a genuine dispute whether M.M. faced a risk of
3 substantial harm by the mere presence of another young child in the home, or that such a risk
4 would have been obvious where the Nevada Administrative Code allows for that placement.
5 Even if the defendants were mistaken about the lawfulness of their conduct, they would have
6 been reasonably mistaken given the Nevada Administrative Code's provision.

7 The plaintiffs next argue that initial foster parent training must be completed before a
8 child is placed in the home but the Juarez-Paezes were permitted to have three children placed in
9 their home before their training was completed. But the evidence shows the Juarez-Paezes
10 completed the required training before M.M. was placed in their home. ECF Nos. 113-10; 113-
11 11 at 4; 113-12; 132-5 at 9-10. The plaintiffs rely on a statement in their expert witness's report
12 that the training was completed on July 29, 2014. ECF No. 128 at 38; *see also* ECF No. 113-12
13 at 11. However, Maira testified the document showing when training was complete had the
14 incorrect date and all training was completed before the children were in the home. ECF No.
15 132-5 at 9-10. That the July 29, 2014 date is a typographical error is consistent with the form
16 itself, which was signed by Lani Aitken and the Juarez-Paezes on April 25, 2014. ECF No. 113-
17 12 at 17, 19. Additionally, it is consistent with the case notes, which show the Juarez-Paezes
18 took their tenth and final training class on March 29, 2014. ECF No. 113-10 at 10.

19 Even if it is not a typographical error, the plaintiffs do not identify any specific required
20 training that was not completed before M.M. was placed in the home or why that would amount
21 to an obvious risk of substantial harm. The plaintiffs also do not explain how the failure to
22 complete training is causally connected to M.M.'s death when all training indisputably was
23 completed before M.M.'s death.

1 Finally, the plaintiffs contend the defendants rushed M.M.'s placement by putting her
2 with the first foster family to respond instead of evaluating the proper placement for her.
3 Assuming the defendants placed her with the first foster parents to respond, that does not raise a
4 genuine dispute that the defendants knew or should have known of an obvious risk of danger to
5 M.M. in the Juarez-Paez home.

6 In sum, the plaintiffs have not pointed to evidence raising a genuine dispute whether the
7 defendants were deliberately indifferent to a substantial risk of harm by placing M.M. with the
8 Juarez-Paezes. Even if a combination of these factors could raise a genuine dispute as to
9 deliberate indifference, the plaintiffs have not pointed to clearly established law putting the
10 defendants on notice that their conduct was unlawful. The defendants therefore are entitled to
11 qualified immunity.

12 3. Failure to Supervise and Protect M.M.

13 The plaintiffs contend the defendants were deliberately indifferent to the risks in the
14 Juarez-Paez home because they failed to monitor M.M. after she was placed there. The evidence
15 shows that while M.M. was in the care of the Juarez-Paezes, one of the defendant case workers
16 visited M.M. in the home three times, M.M. was seen by a doctor several times, and M.M.
17 attended regular visits with her natural mother and siblings. *See* ECF Nos. 113-2; 113-19; 113-
18 20; 120. No one reported any signs of abuse or concerns about M.M.'s well-being.

19 The plaintiffs contend that just because nothing was reported does not mean there were
20 no problems. But the plaintiffs have not presented evidence that any concerns were raised by
21 anyone about M.M.'s placement prior to her death. Defendant Shuuandy Alvarez conducted an
22 in-home visit less than a month before M.M.'s death and saw no warning signs. ECF No. 132-5
23 at 11.

1 The plaintiffs argue M.M. lost weight, as shown by the doctor's records, and that should
2 have alerted the defendants to the fact that the Juarez-Paezes were not properly caring for M.M.
3 M.M. was seen by a doctor on July 22, 2014, a loss of weight was noted, and she was scheduled
4 for another appointment within 30 days. ECF No. 113-10 at 16. However, when M.M. was seen
5 again on August 15, 2014, no concerns were noted other than an allergy, and she was scheduled
6 for her next appointment three months later. ECF No. 120 at 6-7.

7 Finally, the plaintiffs note that Maira testified that she told defendant Lani Aitken that
8 Joaquin was struggling and they needed help with childcare. ECF No. 128 at 18-19, 25-26.
9 According to Maira, Aitken responded that the Juarez-Paezes did not qualify for subsidized child
10 care. *Id.* Maira also testified the defendants knew she was working two or three jobs while
11 taking care of the kids. ECF No. 128 at 19-22.

12 The struggles Maira identified were related to Joaquin not knowing which child to attend
13 to first when both got fussy at the same time. ECF No. 132-5 at 6. Maira testified she gave
14 Joaquin advice on how to address those kinds of problems. *Id.* There is no evidence that Joaquin
15 was becoming physically abusive as a result of any of struggles he was having dealing with the
16 children. To the contrary, shortly before M.M.'s death, Maira inquired about also fostering
17 M.M.'s siblings. Thus, rather than signaling trouble about being overwhelmed in caring for two
18 children with no subsidized childcare, Maira indicated to the defendants that the Juarez-Paezes
19 were willing and able to take on more children. *See* ECF Nos. 113-19 at 6-7; 132-1 at 9-10; 132-
20 6 at 5, 7-8. Additionally, Maira described Joaquin as "fine" on the day of the incident and that
21 "[e]verything was like normal routine." ECF No. 132-5 at 12. As discussed earlier, Maira—who
22 lived in the home, saw Joaquin interact with the children, and knew Joaquin best—did not see
23

1 warning signs. *Id.* at 13. A reasonable jury could not find the defendants were deliberately
2 indifferent to a substantial risk of harm to M.M.

3 4. Failure to Attempt Reunification

4 The plaintiffs argue the defendants did not attempt reunification of the Momox-Caselis
5 children with their natural parents until after M.M. died. This allegation is not in count two of
6 the second amended complaint. Moreover, the plaintiffs do not explain how the failure to
7 attempt reunification efforts earlier constitutes deliberate indifference to a substantial risk of
8 harm. Nor do the plaintiffs point to any clearly established law that would put the defendants on
9 notice that their conduct was unlawful. The defendants therefore are entitled to qualified
10 immunity.

11 5. Failure to Train Foster Care Social Workers

12 The plaintiffs do not identify what training for social workers was lacking or point to
13 evidence in support of this argument. The defendants therefore are entitled to summary
14 judgment on this portion of count two.

15 6. Policy, Custom, or Practice

16 In their brief, the plaintiffs state that “[t]hrough discovery, Plaintiffs have identified
17 official Clark County policies that were clearly inadequate in protecting M.M.” ECF No. 124 at
18 12. However, the plaintiffs do not identify a policy, custom, or practice or point to any evidence
19 in support of this argument. I therefore grant summary judgment on the policy, custom, or
20 practice allegations in count two.

21 7. Summary

22 The plaintiffs have not pointed to evidence raising a genuine dispute whether M.M. faced
23 a substantial risk of harm of which the defendants knew or should have known. Consequently,

1 no reasonable jury could find the defendants acted with deliberate indifference to M.M.'s safety.
2 Further, the plaintiffs have not identified any clearly established law that would put the
3 defendants on notice that their conduct was unlawful, so the defendants are entitled to qualified
4 immunity. Finally, the plaintiffs have not identified a policy, custom, or practice that led to
5 M.M.'s death, and have not pointed to evidence in the record in support. I therefore grant the
6 defendants' motion for summary judgment on count two.

7 **C. Count Three**

8 In count three, the plaintiffs allege defendants Clark County and Lisa Ruiz-Lee had an
9 obligation to properly train foster care workers but failed to do so, in deliberate indifference to
10 foster children. The defendants argue there is no evidence that the training is inadequate, the
11 defendants acted with deliberate indifference, or the alleged lack of training deprived the
12 plaintiffs of constitutional rights. The plaintiffs respond that they have produced evidence that
13 Clark County policies were inadequate in protecting M.M., county employees consistently
14 violated official policies without repercussion, and the county's own investigation showed its
15 policies and practices are inadequate.

16 Contrary to their assertions, the plaintiffs have not pointed to evidence of a failure to train
17 foster care social workers. I therefore grant the defendants' motion for summary judgment on
18 count three.

19 **D. Counts Four and Six²**

20 Count four alleges various defendants were negligent and violated their state statutory
21 duty to exercise reasonable judgment and care in carrying out their responsibilities. The
22

23 ² Count five alleges Maira and Joaquin Juarez-Paez were negligent in their care of M.M.
This claim was asserted against only the Juarez-Paezes, so I do not address it further.

1 plaintiffs allege the defendants breached their duties to (1) comply with Nevada Administrative
2 Code chapters 424 and 432B in licensing the Juarez-Paezes; (2) adequately supervise M.M.
3 while in the Juarez-Paez home; (3) investigate violations of DFS policy by the Juarez-Paezes;
4 and (4) exercise reasonable care in investigating the Juarez-Paez home, supervising M.M. while
5 in the home, and not pursuing reunification efforts. Count six alleges the defendants negligently
6 caused M.M.'s wrongful death.

7 The plaintiffs move for partial summary judgment on the duty element of their
8 negligence and wrongful death claims, asserting that because M.M. was a foster child, the
9 defendants owed her a duty as a matter of law. I deny the plaintiffs' motion because it is
10 untimely. The scheduling order set the dispositive motion deadline for April 3, 2018. ECF No.
11 106 at 5. The parties stipulated three times to extend the deadline for the plaintiffs to respond to
12 the defendants' summary judgment motion, but none of those stipulations included an extension
13 of the dispositive motion deadline. *See* ECF Nos. 116, 118, 122. I granted a fourth extension to
14 file the response, but I did not grant an extension of the dispositive motion deadline. ECF No.
15 127. The plaintiffs filed the countermotion on May 21, 2018, well beyond the deadline.

16 The defendants move for summary judgment on these two claims, arguing they are
17 entitled to discretionary immunity. Alternatively, they argue the plaintiffs fail to identify any
18 provision of state law that they violated. The plaintiffs respond that the defendants' failures were
19 addressed in relation to the federal claims. The plaintiffs also argue that the defendants are not
20 entitled to discretionary immunity.

21 A plaintiff asserting a negligence claim in Nevada must show "(1) an existing duty of
22 care, (2) breach, (3) legal causation, and (4) damages." *Turner v. Mandalay Sports Entm't, LLC*,
23 180 P.3d 1172, 1175 (Nev. 2008) (en banc) (quotation omitted). Nevada state law grants

1 discretionary act immunity to certain governmental actors. Nevada Revised Statutes § 41.032(2)
2 states that “no action may be brought under NRS 41.031 or against . . . an officer or employee of
3 the State or any of its agencies or political subdivisions which is . . . [b]ased upon the exercise or
4 performance or the failure to exercise or perform a discretionary function or duty on the part of
5 the State or any of its agencies or political subdivisions or of any officer, employee or immune
6 contractor of any of these, whether or not the discretion involved is abused.” Section 41.032(2)
7 thus “grants the State and its political subdivisions sovereign immunity from civil liability when
8 the challenged act was discretionary in nature.” *Ransdell v. Clark Cty.*, 192 P.3d 756, 761 (Nev.
9 2008) (en banc). “[G]overnment actions fall within the scope of discretionary-act immunity
10 when they (1) involve an element of individual judgment or choice, and (2) are based on
11 considerations of social, economic, or political policy.” *Id.* at 762 (quotation omitted).

12 1. Clark County

13 The parties dispute whether defendant Clark County is the type of defendant that is
14 entitled to discretionary act immunity. The plaintiffs cite no law for their argument that Clark
15 County’s actions are not subject to discretionary act immunity. The Supreme Court of Nevada
16 has previously granted Clark County discretionary act immunity. *See id.* at 764. The plaintiffs
17 do not identify any act Clark County took independent of the other defendants, who are Clark
18 County employees. Because, as discussed below, the county’s employees are entitled to
19 summary judgment on the state law claims, so is Clark County.

20 2. Lisa Ruiz-Lee and Tara Donahue

21 The plaintiffs argue defendants Lisa Ruiz-Lee and Tara Donahue created policy and
22 therefore cannot be immune under discretionary immunity. The defendants respond that the
23

1 plaintiffs have not identified what policy Ruiz-Lee and Donahue created that led to M.M.'s
2 death.

3 The plaintiffs cite no law for the proposition that a defendant who makes policy is not
4 entitled to discretionary immunity. Additionally, the plaintiffs do not identify what policy they
5 claim these defendants promulgated, how these defendants acted negligently in creating the
6 policy, or how any such policy proximately caused M.M.'s death. It is impossible for me to
7 conduct a discretionary immunity analysis because the plaintiffs have not presented enough
8 argument or evidence for me to even identify what it is these defendants allegedly did wrong.
9 Because there is no evidence the defendants were negligent or engaged in conduct for which they
10 would not be entitled to discretionary immunity, I grant their motion as to these two defendants.

11 3. Jeremy Law

12 The plaintiffs argue defendant Jeremy Law is not entitled to immunity for embellishing
13 his investigative findings that resulted in M.M. being removed from her initial foster mother's
14 home. The defendants respond that the plaintiffs cite no law for the proposition that writing a
15 report with "skewed facts" is not discretionary. The defendants also argue there is no evidence
16 the facts were skewed.

17 Law investigated allegations made by another foster child about M.M.'s initial foster
18 parent. That boy asserted that the foster father gave him "pow pows," which were either slaps or
19 spankings. ECF Nos. 113-5; 113-6; 132-24. Decisions about how to investigate a report of child
20 abuse and whether to recommend a child be removed from an allegedly abusive home involve
21 individual judgment or choice and are based on considerations of social, economic, or political
22 policy related to the care and protection of foster children. *See Gonzalez v. Las Vegas Metro.*
23 *Police Dep't*, No. 61120, 2013 WL 7158415, at *2 (Nev. Nov. 21, 2013) (holding that police

1 decision to arrest or detain a suspect based on a warrant involved individual judgment and was
2 “in furtherance of public policy goals, including the apprehension and arrest of wanted criminals
3 pursuant to a facially valid warrant”). Even if the plaintiffs are correct that an investigator
4 nevertheless has no discretion to present a “skewed” version of the facts in a written report (a
5 proposition for which the plaintiffs cite no law and conduct no analysis), the plaintiffs present no
6 evidence that Law “skewed” the facts. To the contrary, the findings of physical discipline were
7 upheld by a hearing officer for the Clark County DFS. ECF No. 113-28 at 8. I therefore grant
8 the defendants’ motion as to Law.

9 4. Patricia Meyers and Shuuandy Alvarez

10 As to defendants Patricia Meyers and Shuuandy Alvarez, the plaintiffs argue their failure
11 to train the Juarez-Paezes and failure to report dangerous conditions in the home were not
12 discretionary. The plaintiffs also argue Alvarez had a non-discretionary duty to perform monthly
13 checks on M.M., and Meyers had the non-discretionary obligation to ensure Alvarez conducted
14 the monthly checkups. The defendants respond that these two defendants were not responsible
15 for training the Juarez-Paezes and they could not report dangerous conditions in the home
16 because they saw none. The defendants admit that Alvarez’s last home visit was not timely, but
17 they argue that has no causal connection to M.M.’s death because the last visit occurred before
18 M.M.’s death, Alvarez saw no signs of abuse during the visit, and M.M. saw her natural parents
19 after that and they did not report any concerns.

20 The plaintiffs do not point to any evidence that either of these defendants had the
21 responsibility to train the Juarez-Paezes and failed to do so before children were placed in the
22 home. As discussed above, the evidence shows the training was completed before M.M. was
23 placed in the home and well before her death.

1 The plaintiffs also have not identified what dangerous conditions in the home these
2 defendants were required to report. There is no evidence they observed or were aware of a
3 dangerous condition in the home.

4 Finally, even if Alvarez's last visit was untimely, and thus a violation of a non-
5 discretionary duty to check on M.M. every 30 days, the plaintiffs do not explain how that is
6 causally connected to M.M.'s death. Alvarez saw no warning signs on any of her visits. M.M.'s
7 parents had visits with her after Alvarez's last visit and there is no evidence they noticed
8 anything amiss. As discussed above, even on the very day of the incident Maira did not detect
9 any warning signals about what was going to happen. The timing of the last visit thus had no
10 causal connection to M.M.'s death. I therefore grant the defendants' motion as to Meyers and
11 Alvarez.

12 5. Lani Aitken

13 The plaintiffs argue that although licensing may involve some discretionary decisions,
14 there are mandatory requirements before a foster home may be licensed, and Lani Aitken's
15 decision to place the children in the Juarez-Paez home before they completed the training was
16 not discretionary. The defendants respond that all requirements for licensing, including training,
17 were completed before M.M. was placed in the Juarez-Paez home.

18 As discussed previously, there is no evidence from which a reasonable jury could
19 conclude that the children were placed in the home before training was completed. The plaintiffs
20 do not identify what other mandatory steps were not completed and they cite no supporting
21 evidence. I therefore grant the defendants' motion as to Aitken.

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1 **II. CONCLUSION**

2 IT IS THEREFORE ORDERED that the plaintiffs' motion to amend **(ECF No. 125)** is
3 **DENIED.**

4 IT IS FURTHER ORDERED that the plaintiffs' motion for partial summary judgment
5 **(ECF No. 126)** is **DENIED.**

6 IT IS FURTHER ORDERED that the defendants' motion to strike **(ECF No. 131)** is
7 **DENIED.**

8 IT IS FURTHER ORDERED that the defendants' motion for summary judgment **(ECF**
9 **No. 113)** is **GRANTED.** The clerk of court is instructed to enter judgment in favor of
10 defendants Clark County, Tara Donohue, Lisa Ruiz-Lee, Kim Kallas, Patricia Meyers, Jeremy
11 Law, Shuuandy Alvarez, Lani Aitken, and Oscar Benavides and against the plaintiffs.

12 DATED this 26th day of December, 2018.

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16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
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